No. 45498-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lance Larson,

Appellant.

Kitsap County Superior Court Cause No. 13-1-00288-2

The Honorable Judge Jennifer A. Forbes

Appellant's Reply Brief

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ARGUMENT

I. NO RATIONAL TRIER OF FACT COULD FIND BEYOND A REASONABLE DOUBT THAT MR. LARSON POSSESSED A CONTROLLED SUBSTANCE ON DECEMBER 31ST.

The state presented insufficient evidence to prove that Mr. Larson possessed drugs on December 31st. Only two pieces of evidence related to that date: Mr. Larson's statement that he'd smoked meth that had been passed around at a party, and his positive UA three days after the party. RP 310-12, 351. Even when taken in a light most favorable to the prosecution, this evidence does not prove possession. *State v. A.T.P.-R*, 132 Wn. App. 181, 185, 130 P.3d 877 (2006); *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). At most, it shows that Mr. Larson momentarily controlled and ingested drugs on December 31st.

Evidence that Mr. Larson ingested meth is not enough to establish possession. *A.T.P.-R*, 132 Wn. App. at 185. The state argues otherwise, relying on *State v. Dalton.* Brief of Respondent, pp. 7-10 (*citing State v. Dalton*, 72 Wn. App. 674, 865 P.2d 575 (1994)). But the facts of Mr. Larson's case are analogous to those of *A.T.P.-R.*, not of *Dalton.*[1]

In *A.T.P.-R.*, the evidence showed that a youth smelled of alcohol and stood next to a friend holding a bottle of beer. *A.T.P.-R.*, 132 Wn.

[1] In *Dalton*, the police contacted the accused youth at a keg party. *Dalton*, 72 Wn. App. at 677. He was clearly intoxicated. *Id.* In that context, circumstantial evidence permitted the inference that he had had dominion and control over alcohol. *Id.*

App. at 184. This evidence did not prove possession, absent some evidence of dominion and control over the alcohol. *Id.* at 185. The evidence demonstrated, at most, that the accused drank some of his friend's beer.

Likewise, even when taken in the light most favorable to the state, the evidence here proves only that Mr. Larson used drugs belonging to another party-goer. Absent other evidence of dominion and control, Mr. Larson's positive UA and his admission to ingesting drugs does not prove possession. *Id.* at 185.

Any inference that Mr. Larson physically held a meth pipe does not suffice. *George*, 146 Wn. App. at 920. At most, the evidence shows momentary, passing control. This does not prove possession. *Id.* The state does not respond to this argument. The lack of argument from respondent may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

The jury rejected the state's theory that Mr. Larson possessed the pipe found in the bedroom he shared with his girlfriend. RP 490. Still, Respondent argues that the pipe offers further evidence that Mr. Larson possessed meth on December 31st. Brief of Respondent, p. 10.

This argument is incorrect. First, the argument ignores jury's special verdict. The jurors acquitted Mr. Larson of possessing the pipe

and residue. RP 490. Second, even if the jury had believed the pipe was his, Respondent does not explain how possession of the pipe over a week later illuminates Mr. Larson's activities on December 31st.

No rational jury could have found beyond a reasonable doubt that Mr. Larson possessed a controlled substance on December 31st. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied,* 176 Wn.2d 1003, 297 P.3d 67 (2013). Mr. Larson's possession conviction must be reversed. *Id.*

II. MR. LARSON WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Defense counsel unreasonably failed to suppress Mr. Larson's statement under the *corpus delicti* rule.

The *corpus delicti* rule precludes conviction based solely on the accused's confession. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). The rule requires suppression of an inculpatory statement unless it is corroborated by independent evidence. *State v. Whalen*, 131 Wn. App. 58, 62, 126 P.3d 55 (2005). Evidence introduced by the defense at trial, however can provide the necessary corroboration for *corpus delicti*. *State v. Pietrzak*, 110 Wn. App. 670, 680, 41 P.3d 1240 (2002).

Here, Mr. Larson's defense attorney did not move to suppress his statement that he had used meth on December 31st until after counsel had

elicited the very corroboration necessary to admit it. RP 310-12, 375. Failure to raise the issue earlier in the course of the trial constituted deficient performance. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The state responds that a motion to suppress at the beginning of trial would not have been granted. According to Respondent, the positive UA on January 2nd and the pipe later found in the room Mr. Larson shares with his girlfriend corroborated his statement. Brief of Respondent, pp. 13-14. But neither piece of evidence shows actual possession on December 31st.

The positive UA proves only that drugs had been absorbed into Mr. Larson's system. As noted above, ingestion is insufficient to prove possession. *A.T.P.-R.*, 132 Wn. App. at 185. Though the corroborating evidence necessary under the *corpus* rule need not be enough to convict on its own, the UA in Mr. Larson's case has no bearing on whether he ever had dominion and control over the drugs at the party. Likewise, the pipe in Mr. Larson's bedroom over a week later does nothing to clarify the events of December 31st. The evidence of Mr. Larson's positive UA and the pipe in his bedroom over a week later cannot supply the independent evidence necessary under the *corpus* rule.

Defense counsel provided ineffective assistance by failing to move for suppression of Mr. Larson's statement based on the rule of *corpus*

delicti at the beginning of trial. *Kyllo*, 166 Wn.2d at 862. Mr. Larson's possession conviction must be reversed. *Id.*

B. Defense counsel provided ineffective assistance by failing to propose an instruction informing the jury that momentary handling is insufficient to establish possession.

Because the state does not respond to this issue, Mr. Larson relies on the argument in his Opening Brief. Again, the state's failure to respond can be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

III. MR. LARSON'S BAIL JUMPING CONVICTION VIOLATED DUE PROCESS BECAUSE THE COURT'S "TO CONVICT" INSTRUCTION DID NOT INCLUDE ALL OF THE ELEMENTS.

A "to convict" instruction must contain all the elements of the crime. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The instruction serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *Id.* The court's to-convict instruction for bail jumping relieved the state of its burden to prove that Mr. Larson had failed to appear in court "as required." CP 54; RCW 9A.76.170. Respondent does not contest that failure to appear "as required" is an element of bail jumping that the state must prove beyond a reasonable doubt. Brief of Respondent, pp. 14-18.

The jury has the right to regard the court's elements instruction as a complete statement of the law. *State v. Smith,* 131 Wn.2d 258, 263, 930

P.2d 917 (1997). Nonetheless, the state argues that the court's instructions were sufficient because a separate instruction defining bail jumping included the requirement that the accused fail to appear "as required." Brief of Respondent, pp. 16-18. Respondent misapprehends the role of the to-convict instruction. Indeed, any conviction based on an incomplete "to convict" instruction must be reversed. *Smith,* 131 Wn.2d at 263. This is so even if the missing element is supplied by other instructions. *Id; Lorenz,* 152 Wn.2d 22 at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). The state's argument based on a separate instruction defining bail jumping does not change the analysis.[2]

Respondent also points out that the to-convict instruction included the element that Mr. Larson had been released by court order "with knowledge of the requirement of a subsequent personal appearance." Brief of Respondent, p. 18. But that language delineates a separate element of the offense. Mr. Larson's knowledge upon his release is irrelevant to when he allegedly failed to appear. Without the element that Mr. Larson failed to appear "as required," the jury could have found him guilty based on non-appearance in court at some irrelevant date and time.

[2] The state also points out that the court's instruction mirrored the WPIC. Brief of Respondent, p. 18. But an erroneous jury instruction requires reversal regardless of whether it is a pattern instruction. *See e.g. State v. Woods*, 138 Wn. App. 191, 200, 156 P.3d 309 (2007); *State v. Irons*, 101 Wn. App. 544, 4 P.3d 174 (2000).

The error here is presumed prejudicial, and the state cannot establish that it was harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Mr. Larson's bail jumping conviction must be reversed. *Id.*

IV. MR. LARSON'S BAIL JUMPING CONVICTION VIOLATED HIS RIGHT TO ADEQUATE NOTICE BECAUSE THE INFORMATION OMITTED AN ESSENTIAL ELEMENT.

The constitutional right to adequate notice of charges requires that all essential elements of an offense be included in the charging document. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). An essential element is "one whose specification is necessary to establish the very illegality of the behavior." *State v. Johnson*, 119 Wn.2d 143, 829 P.2d 1078 (1992) (citing *United States v. Cina,* 699 F.2d 853, 859 (7th Cir.), *cert. denied,* 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

The Information charging Mr. Larson was deficient because it omitted the essential element that he had failed to appear in court "as required." *Zillyette*, 178 Wn.2d at 158; *State v. Williams*, 162 Wn.2d 177, 184, 170 P.3d 30 (2007); RCW 9A.76.170(1). Again, the state does not dispute that failure to appear "as required" is an essential element of bail jumping. Brief of Respondent, pp. 19-23.

The missing element cannot be read into any fair construction of the document charging Mr. Larson. *Zillyette*, 178 Wn.2d at 161. The

charging language did not allege when Mr. Larson was required to appear. CP 2. Instead, it specified only that Mr. Larson had failed to appear "on or about" a certain date. CP 2. Even so, the state argues that the Information was sufficient because it stated that Mr. Larson had been "released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance..." Brief of Respondent, pp. 22-23. But the language upon which the state relies does nothing to clarify whether Mr. Larson failed to appear at a specific date and time required by the court. Respondent fails to spell out a fair construction of Mr. Larson's charging document that includes the element of failure to appear "as required," even under the more liberal post-conviction standard.

The charging document violated Mr. Larson's constitutional right to notice because it omitted an essential element of bail jumping. *Zillyette*, 178 Wn.2d at 158. Mr. Larson's bail jumping conviction must be reversed. *Id.* at 162.

V. THE COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. LARSON TO PAY LEGAL FINANCIAL OBLIGATIONS THAT ARE NOT PERMITTED BY THE CONSTITUTION OR BY STATUTE.

A. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

Mr. Larson relies on the argument set forth in his Opening Brief.

B. The court violated Mr. Larson's right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that he had the present or future ability to pay.

Because the state does not respond to Mr. Larson's constitutional claim, he relies on the argument set forth in his Opening Brief. The lack of argument from respondent on this issue can be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

C. The record does not support the sentencing court's finding that Mr. Larson has the ability or likely future ability to pay his legal financial obligations.

Mr. Larson relies on the argument in his Opening Brief. Again, respondent's failure to argue this issue can be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

D. The state concedes that the court exceeded its authority by ordering Mr. Larson to pay a $1439.74 jury demand fee.

The legislature has authorized courts to impose a jury demand fee of $250 in cases involving a twelve-person jury. RCW 36.18.016(3)(b). The state concedes that the court erred by ordering Mr. Larson to pay a $1439.74 jury demand fee, which is not authorized by statute. Brief of Respondent, p. 26. The court should accept the state's concession and strike the fee.

E. The state concedes that the court exceeded its authority by ordering Mr. Larson to pay $100 into an "expert witness fund."

The court ordered Mr. Larson to pay $100 into an expert witness fund despite the fact that no experts who were not already employed by the state were called at trial. CP 12. The state concedes that this was error. Brief of Respondent, p. 26. The court should accept the state's concession and strike the $100 fee.

F. The court exceeded its authority by ordering Mr. Larson to pay $500 to the Kitsap County sheriff's office.

The court may only order an offender to pay LFOs reflecting "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). The court may not order LFOs that are not authorized by statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011). The court is also prohibited from ordering payment of "expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." RCW 10.01.160.

Here, the court exceeded its authority by ordering Mr. Larson to pay a $500 "Contribution to SIU – Kitsap County Sheriff's Office."[3] CP

[3] The portion of Mr. Larson's Judgment and Sentence ordering payment of this fee cites to RCW 9.94A.030 and RCW 9.94A.760. RCW 9.94A.030 is the subsection containing all of

12. The state responds by pointing out that RCW 9.94A.030(30) could be read to permit the assessment of "drug fund contributions." Brief of Respondent, pp. 25-26. But the court did not order Mr. Larson to pay into a "drug fund." CP 12. Rather, the court ordered him to pay an unauthorized fee to the sheriff's office, in general. The state's argument regarding "drug funds" is inapposite.

The costs of operating the sheriff's department were not "specially incurred by the state in prosecuting" Mr. Larson. RCW 10.01.160(2). The assessments for the sheriff's office must be vacated, and Mr. Larson's case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

CONCLUSION

For the reasons set forth above and in Mr. Larson's Opening Brief, his convictions for drug possession and bail jumping must be reversed. In the alternative, the orders that Mr. Larson pay the cost of his court-appointed attorney, a $1439.74 jury demand fee, and other unauthorized LFOs must be vacated and the case remanded for correction of the judgment and sentence.

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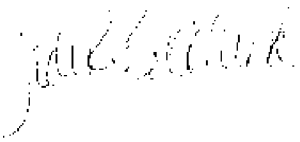
the definitions related to the Sentencing Reform Act. RCW 9.94A.760 addresses legal financial obligations, in general. Neither statute illuminates the source from which the court claims to draw its authority to order payment to the Kitsap County Sheriff's Office.

Respectfully submitted on June 25, 2014,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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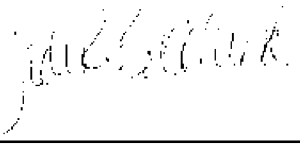
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 25, 2014.



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